Supreme Court, U.S.
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No. 94-1025

In The

Supreme Court of the United States

October Term, 1994

JOHN T. ENGSTROM, ET AL.,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 532(3) of the Soldiers' and Sailors' Civil Relief Act, which provides that "[n]o sale, foreclosure, or seizure of property for nonpayment of any sum due under any [obligation secured by . . . security in the nature of a mortgage upon real or personal property owned by a person in military service] . . . shall be valid if made . . . during the period of military service," prohibits a creditor bank, which has a lien on farm equipment to secure the debts of a family farmer who is on active military duty, from arranging an auction of the debtor's farm equipment, approving the sales at the auction, signing the debtor's name to the check for the proceeds from the auction, and applying those proceeds toward the debtor's and his family's outstanding farm loans with the Bank.

2. Whether the Fifth Circuit's interpretation § 532 of the Soldiers' and Sailors' Civil Relief Act as being inapplicable to the conduct of Respondent First National Bank of Eagle Lake in this case is inconsistent with the construction of the Act mandated by the Supreme Court in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993).

3. Whether § 536 of the Soldiers' and Sailors' Civil Relief Act extends the protections of § 532 to an active service member's family members and their family farming entities who are affected by the military service.

QUESTIONS PRESENTED – Continued

4. Whether in rejecting Petitioners' claims under the Soldiers' and Sailors' Civil Relief Act the lower courts improperly applied and/or disregarded the proper standard of review of the evidence on a motion for summary judgment.

5. Whether a proper review of the summary judgment evidence in this case shows that there are genuine issues of material facts with respect to whether the Respondent Bank was responsible in whole or in part for the seizure, foreclosure on, and/or sale at auction of Petitioners' farm equipment while Captain Engstrom was on active military duty in the Persian Gulf.

LIST OF PARTIES

1. Petitioners are:

a) John T. Engstrom, Individually and as Next Friend of Andrea Engstrom, a minor;

b) Lyndia Engstrom, Individually and as Next Friend of Andrea Engstrom, a minor;

c) John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture;

d) Coltair Farms, Inc.

2. Respondent is The First National Bank of Eagle Lake, Texas.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW Petitioners John T. Engstrom and Lyndia Engstrom, Individually and as next friends of Andrea Engstrom; John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture; and Coltair Farms, Inc., and request that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this cause, and as grounds for review by writ of certiorari Petitioners would respectfully show the Supreme Court the following:

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under 28 U.S.C. § 1254(1).

This is an appeal from a summary judgment granted by the district court and affirmed by the court of appeals in an action brought by Petitioners under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx. § 501, et seq., with pendent state claims. The Fifth Circuit rendered its opinion and judgment on March 29, 1995, in Cause No. 93-2719, *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995).

STATUTES INVOLVED

The pertinent provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §§ 501, et seq. include the following:

§ 532. Mortgages, trust deeds, etc.

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some other person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service –

(a) stay the proceedings as provided in this Act [50 U.S.C. Appx. §§ 501, et seq.]; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 [50 U.S.C. Appx. § 517][1], unless upon an order previously granted by the court and a return thereto made and approved by the court.[2]

(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.[3]

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[1] Section 517 provides that the prohibitions of the Soldiers' and Sailors' Civil Relief Act may be modified or waived by written agreement executed by the service member during or after the period of military service. No such written agreement is at issue here.

[2] In 1991, shortly after the events in this case, an amendment to § 532(3) deleted the words "after the date of enactment of the Soldiers' and Sailors' Civil Relief Act and" following "valid if made." This minor technical amendment has no bearing on the issues presented here.

[3] Another 1991 amendment substituted the words "shall be fined as provided in Title 18, United States Code, or imprisoned for not to exceed

> **§ 536. Extension of benefits to dependents**
>
> Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

STATEMENT OF THE CASE

I. Proceedings In The Courts Below

Petitioners filed this lawsuit in Texas state court in 1991. On August 26, 1991, Respondent removed this case to the Southern District of Texas, Houston Division, in Cause No. H-91-2392. (R. 10:19, 29)[4]

Petitioners then filed a First Amended Complaint. (R. 7:332) Petitioners' pleadings allege that in late 1990 and early 1991, while U. S. Navy Captain John T. Engstrom was on active military duty in the Persian Gulf, Respondent First National Bank of Eagle Lake ("the Bank") took action to foreclose on and sell at auction the Engstroms' family farm equipment, applying the proceeds toward the balance of the family's farm loans from the Bank which were secured by the equipment. Petitioners allege that the sale was invalid and

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one year" for the words "shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000."

[4] The notation "R" refers to the Record in this case. It is referenced by volume and page numbers (separated by a colon). For additional references, the district court's docket sheet listing the documents in the Record appears at the front of Vol. 1 of the Record, which is at present in the custody of the district clerk.

wrongful, rendering the Bank liable for violations of § 532 and § 536 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx. § 501, et seq., as well as the Texas Deceptive Trade Practices Act, TEX.BUS.&COM.CODE § 17.41, et seq. (R. 7:332) On September 1, 1992, Respondent filed a motion for summary judgment on two alleged grounds:

(1) that the "undisputed evidence" shows that the Engstroms' farm equipment was not seized and sold by the Bank, but rather was "sold by [neighboring farmer] Jim Clipson acting at the direction of John Engstrom," and therefore the Soldiers' and Sailors' Civil Relief Act did not apply; or alternatively

(2) that none of the Plaintiffs other than John Engstrom has standing to sue under the Relief Act because the farm equipment was owned only by John Engstrom. (R. 7:230, 279, 277)

Petitioners filed a response to the motion for summary judgment, with attached affidavits by Captain Engstrom and his wife, Lyndia Engstrom, along with various deposition excerpts and extensive documentary evidence from the Bank's files on the Engstroms' loans. (R. 4:1311; 4:1242-1306) Petitioners later supplemented the response with additional documentary evidence. (R. 2:2396-2505)

On September 2, 1993, the district court granted the motion for summary judgment on the first alleged ground only. (R. 1:2530) In its accompanying memorandum, the district court declared that the Bank was not responsible for the sale of the Engstroms' equipment and therefore could not be held liable under the Soldiers' and Sailors' Civil Relief Act. (R. 1:2529)[5]

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[5] In its order granting partial summary judgment on Petitioners' claims under the Soldiers' and Sailors' Civil Relief Act, the district court also directed that the pendent claims under Texas law be severed and remanded to state court. (R. 1:2530) Respondent filed a cross-appeal of the remand order.

On March 29, 1995, the Fifth Circuit affirmed the summary judgment and remand order by its opinion and judgment in *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995).

II. Statement Of Facts

Petitioner John T. Engstrom is a Captain in the United States Navy. In 1989-90, while Captain Engstrom was on reserve military status, he and his wife Lyndia Engstrom and their three daughters, Melissa, Cynthia, and Andrea Engstrom were operating a family rice farm in Colorado County, Texas. The rice farm was the Engstrom family's principal source of income; all of the family members participated in the farm labor and the running of the business. (R. 6:781, 779, 695-701, 684-690)

During 1989 and 1990, the First National Bank of Eagle Lake made several loans to John T. Engstrom and to two family business entities owned by John T. Engstrom and two of his daughters, Melissa and Cynthia: Coltair Farms, Inc., a Texas corporation, and JTE Farms Joint Venture.[6] The loans were for the purchase of various items of farm equipment and the financing of the Engstroms' rice farming business. (R. 6:781)

As of June 30, 1990, the total outstanding balance of the Engstroms' various loans from the Bank was $211,187. (R. 6:721) John Engstrom owed $63,396 on a promissory note for several consolidated loans which were secured by all of the Engstroms' farming equipment (including a GMC Suburban and various tractors, combines, trucks, tools, etc.), as well as an $18,000 real estate debt; JTE Joint Venture owed almost

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[6] The Fifth Circuit's opinion at one point mistakenly identifies Captain John T. Engstrom as "Tom" Engstrom and mistakenly lists "John T. Engstrom" as one of the Engstroms' children. 47 F.2d at 1462. The Engstroms have no sons. It is Captain Engstrom himself who was doing business as JTE Farms Joint Venture with his two eldest daughters, Melissa and Cynthia.

$80,000 on two other loans, one secured by the same farm equipment as John Engstrom's loans and the other by the Engstroms' 1990 rice crop; and Coltair, Inc. owed $50,181 on another loan secured by the 1990 rice crop. (R. 6:231-234, 721)

The Bank's file on the Engstroms' farm loans shows that the collateral on the loans collectively had been valued at $412,599.[7] (R. 6:721)

In spite of this initial high value placed on the collateral, the loan file reveals a continuing concern on the Bank's part about repayment of the loans due to the poor crop yields in 1990 and the devaluation of the Engstroms' collateral as a result. The file reflects that as of at least June 30, 1990, the Bank had a contingent plan to "liquidate" the farm equipment in order to satisfy the debts if they were not paid by the end of 1990. The monthly loan-status reports from the Bank's file during the Summer and early Fall of 1990 describe the Engstroms' debt situation and the Bank's planned course of action. After setting out the various loan balances, these reports (dated as indicated) state in part as follows:

June 30, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: If debtor does not pay out from 1990 harvest, ask him to move loan or furnish high-quality collateral **or liquidate.**

STATUS: Awaiting harvest and sale of crop."

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[7] The Fifth Circuit's opinion mistakenly states that the Engstroms' *debts* to the Bank amounted to "approximately $412,600." 47 F.2d at 1461. The collective *debts* at that time amounted to $211,187; the Bank had valued the *collateral* at $412,599.

The failure by the court of appeals to get a number of the basic *undisputed* facts straight contributes to Petitioners' dismay about the court's flawed review of the *disputed* facts and testimony in evidence.

(R. 6:721) (emphasis added)

July 31, 1990

[same as June 30 summary]

(R. 6:723)

August 31, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: If debtor does not pay out from 1990 harvest, ask him to move loan or furnish high-quality collateral **or liquidate**.

STATUS: Awaiting harvest and sale of crop. He has approximately 140A of rice to cut. Plans to start o/a 9/12. Will have no second crop. Expects yields of 31 or 32 bbls. overall. **His naval reserve unit has not been ordered to active duty. He plans to volunteer for duty during the Christmas holidays."**

(R. 6:724) (emphasis added)

September 30, 1990

" * * *

COMMENTS: **John understands that he has to pay out this year.**

* * *

ACTION PLAN: Debtor is to come in 10-10-90 and discuss results of 1990 farming program. If he does not expect to pay out, ask him to move loan or furnish high-quality collateral **or liquidate**.

STATUS: Harvest of first crop is complete. Will have no second crop. Expects yields of 31 or 32 bbls. overall. **He is a naval reservist and expects to be called shortly for a 3 month tour in the Middle East."**

(R. 6:725) (emphasis added)

In October 1990, as expected, Captain Engstrom was reactivated from the Naval reserves and was assigned to active duty with the United States Navy in the Persian Gulf during the Desert Shield and Desert Storm operations. (R. 6:780-781, 711-718; 7:252-253)

Prior to his departure for duty, Captain Engstrom met with the Bank's executive vice-president, Travis Wegenhoft, concerning the handling of the Engstroms' loans while he was overseas. Wegenhoft agreed to an arrangement whereby one of the Engstroms' neighboring farmers, Jim Clipson, would be authorized to sell some of the Engstroms' farm equipment, *one item at a time*, and to apply any sales proceeds to the Engstroms' loan payments. The Bank was to supervise and control all aspects of Clipson's conduct, from advertising to repairing equipment to effectuating sales. Clipson was to receive a five percent commission for handling the sales. (R. 6:780-781, 713-715)

Captain Engstrom prepared a specific price list for Clipson to follow in selling each item of the farm equipment, and Engstrom discussed the price list with Wegenhoft. (R. 6:714) Captain Engstrom also set up a special account at the Bank in which Clipson was to deposit the proceeds of the sales of any equipment and from which withdrawals could be made for any necessary repairs on the equipment. (R. 712-13)

Captain Engstrom specifically instructed Wegenhoft *and* Clipson *not* to sell the Engstroms' farm equipment at an auction sale. Captain Engstrom and Wegenhoft agreed that if the Engstroms' farm debts were not paid off by the time he returned from active duty, the Engstroms and the Bank would *then* decide on a further course of action. (R. 6:713-715; 7:254)

Despite these explicit agreements, the Bank went ahead and arranged to have the bulk of the Engstroms' farm equipment sold at an auction while Captain Engstrom was in the Persian Gulf. The Bank's loan-status reports after Captain Engstrom's departure in October 1990 reveal the Bank's plan

of action and the extent of the Bank's awareness of Captain Engstrom's situation:

October 30, 1990

" * * *

COMMENTS: **Debtor has been called to active duty with the Navy in the Persian Gulf. Crop yields were disastrously low. All income from the sale of crops has been received.** Payment of ASCS deficiency payment is in doubt. Mainly because of increased doubt about the deficiency payment. [sic] The Coltair Farms, Inc. note and note 3 [one of the two JTE loans] above were charged off after the above date. Also, an exposure of $30,000 was estimated for note 4 [the other JTE loan].

* * *

ACTION PLAN: ***Have arranged*** **for Jim Clipson, Jr. to sell all equipment.** Rent house is for sale. Will suggest lowering price closer to values used here.

STATUS: ***Have*** **an appraisal of equipment from local dealer and** ***proceeding*** **to sell equipment. Anything not sold will go into** ***Bank's equipment auction.***"

(R. 6:746) (emphasis added)

November 30, 1990

" * * *

COMMENTS: **Debtor has been called to active duty with the Navy in the Persian Gulf. Crop yields were disastrously low. All income from the sale of crops has been received.** Payment of ASCS deficiency payment is in doubt. Charged off $19,641 on the JV [JTE] and $65,183 on Coltair Farms, Inc.

* * *

ACTION PLAN: ***Have arranged*** **for Jim Clipson, Jr. to sell all equipment.** Rent house is for sale.

> Will suggest lowering price closer to values used here.
>
> STATUS: ***Have*** **an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into *Bank's equipment auction in late January*."**

(R. 6:745) (emphasis added)

Clipson admitted in his deposition that during the time Captain Engstrom was in the Persian Gulf, Clipson consulted repeatedly with Wegenhoft and obtained the Bank's approval before selling any of the Engstroms' equipment: "I took everything to Travis [Wegenhoft]. I did everything through [Wegenhoft]. **[Wegenhoft] okayed whether anything was sold or what**." (R. 7:240) (emphasis added)

Wegenhoft admitted in his deposition that he approved the Engstroms' equipment sales. (R. 6:765) In fact, Wegenhoft signed the bills of sale on several items of the Engstroms' equipment which were sold in early January 1991. (R. 6:736-737, 747) The Bank also paid some of the repair bills on the Engstroms' equipment. (R. 6:752-761, 739-745, 731-736)

Finally, as the Bank had planned, the Engstroms' farm equipment was placed in the **Bank's equipment auction** for liquidation on January 26, 1991. About ten days before the auction, with the apparent cooperation of Clipson (who also owed the Bank on a farm loan at the time), the Engstroms' farm equipment was gathered and taken to a site in Eagle Lake, Texas, where the Bank had arranged with an auctioneer to auction off various Bank debtors' properties. (R. 7:246-248)

The Bank's senior vice-president, Sam Thomson, admitted that he arranged for the auction, contacted the auctioneer, and selected the location of the auction, and that both he and Wegenhoft were present at the auction to see what amounts the Bank would realize from the sale of the equipment. (R. 4:1653-1660, 6:767) In addition, the Bank paid for advertising for the auction and charged the cost to the Engstroms' loan balances. (R. 6:733-34, 760)

Captain Engstrom had no advance notice that his property was going to be auctioned off. (R. 6:780)

The Engstroms' farm equipment sold at the auction for the meager total of $63,952.50; after the Bank deducted a commission for Clipson, the Engstroms' netted only $60,115.35. (R. 6:719, 748) **The Bank took the sale proceeds and applied them toward the balance of two of the Engstroms' loans. Travis Wegenhoft signed John Engstrom's name to the check directing the payment of the proceeds to the Bank and indicating the amounts to be applied to the loan balances**. (R. 6:719)

On February 1, 1991, Wegenhoft sent a handwritten note to Lyndia Engstrom which read as follows:

> Dear Lyndia,
>
> **This morning we received the proceeds from the sale of your farm equipment sold last Saturday, Jan. 26. We ran the funds through your checking account and applied them to the appropriate notes.**
>
> Copies of these transactions are enclosed along with a copy of the list of the equipment sold and what each item brought.
>
> **I know this is hard for you, but you can be proud of what John is doing.** Let me know if I can be of any assistance.

(R. 6:749) (emphasis added)

The Engstroms' summary judgment evidence shows that they lost as much as $186,000 from the market value of their farm equipment because of the manner of its sale. (R. 7:253) The Engstroms also sustained severe injury to their credit reputations. (R. 7:255) The family members all suffered sleeplessness, nightmares, and emotional distress as a result of the wrongful foreclosure and sale of their property, and Lyndia Engstrom suffered such extreme emotional trauma immediately after the sale that she required hospitalization and psychological therapy. (R. 7:255)

ARGUMENT

I. The Fifth Circuit Misconstrued The Soldiers' And Sailors' Civil Relief Act

The lower courts' holding that Respondent First National Bank of Eagle Lake did not violate § 532 of the Soldiers' and Sailors' Civil Relief Act by its actions in effectuating the foreclosure and sale of Petitioners' farm equipment at the Bank's auction stands in disregard of the terms of the statute and the evidence in this case.

The mandate of § 532(3) is specific, direct, and unequivocal with respect to obligations secured by any type of mortgage on real or personal property of persons in military service: **"*No sale, foreclosure, or seizure of property* for nonpayment of any sum due under any such obligation . . . *shall be valid* . . . if made during the period of military service."**

Both the district court and the court of appeals concluded as a matter of law that the Bank did not violate § 532(3). However, the lower courts seriously misconstrued the law applicable to this case and inexplicably disregarded much of the evidence and many of the facts to which the law must be applied.

Curiously, neither the district court in its memorandum nor the Fifth Circuit in its opinion saw fit even to mention, let alone discuss or attempt to distinguish, this Court's recent decision in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993), in which the Court gave a clear directive as to the proper construction of the Soldiers' and Sailors' Civil Relief Act.[8]

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[8] The lower courts completely ignored *Conroy* despite Petitioners' extensive discussion of *Conroy* in their briefs to both courts. See, for example, the Brief of Appellants, pp. 17-19. The Fifth Circuit also surprisingly failed to cite or discuss its own even more recent decision liberally construing the Relief Act in affirming a *criminal* conviction under § 535 of the Act. *United States v. Bomar*, 8 F.3d 226, 231 (5th Cir. 1993). Again, Petitioners had discussed *Bomar* at some length in their Brief of Appellants, at pp. 19-21.

At issue in *Conroy* was § 525 of the Act, which similarly protects service members by providing that the "period of military service shall not be included . . . in computing any period . . . provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

The petitioner in *Conroy* was an Army officer who owned a parcel of land in Maine. He had failed to pay real estate taxes for 1984-1986, resulting in a tax lien which he had 18 months to pay off or else lose title to the property to the city. Notwithstanding § 525, the lower courts in *Conroy* upheld the forfeiture of the officer's title to the land after his non-payment of the tax lien during the 18-month redemption period, reasoning that the officer's service status had not impaired his ability to pay.

Reversing the lower courts, the Supreme Court held that § 525 rendered the forfeiture invalid. The Court pointed out that "[t]he statutory command in § 525 is unambiguous, unequivocal, and unlimited." *Conroy*, 113 S.Ct. at 1564. Observing that the very essence of the Relief Act is that it "suspends various civil liabilities of persons in military service," *id.* at 1563-4[9] the Court held that Congress's command

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[9] In the very first section of the Act (other than the title section), 50 U.S.C. Appx. § 510, Congress makes the protective purpose of the Act explicit:

> In order to provide for, strengthen, and expedite the national defense . . . and to enable the United States the more successfully to fulfill the requirements of the national defense, **provision is hereby made to suspend the enforcement of civil liabilities, in certain cases, of persons in the military service of the United States** in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following **provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in the armed services** . . . .

(emphasis added)

must be enforced according to its terms regardless of whether a particular liability sought to be enforced against a service member happens to impose any particular degree of hardship.[10]

This Court has also previously stated, in *Boone v. Lightner*, 319 U.S. 561, 574 (1943), that "[t]he Soldiers' and Sailors' Civil Relief Act is *always* to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." (emphasis added)

The same construction applies to § 532(3) of the Relief Act in the present case. But the Fifth Circuit, having ignored *Conroy*, also disregarded its mandate regarding construction of the Relief Act's terms. Instead of applying the statute's unambiguous and unlimited command literally and broadly, the Fifth Circuit's discussion of the Relief Act falls back on pre-*Conroy* equivocation, citing old state court decisions for the propositions that "[a]lthough the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims," and that the Act "is to be administered as an instrument to accomplish substantial justice which requires an equitable consideration of the rights of parties to the end that their respective interests may be properly considered." 47 F.3d at 1462.

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[10] See also *In re A. H. Robins & Co.*, 996 F.2d 716, 718 (4th Cir. 1993) (mandatory tolling of limitations periods in § 525 not dependent on actual effect on service member's exercise of legal rights); *Detweiler v. Peña*, 38 F.2d 591, 593 (D.C. Cir. 1994) (§ 525 tolling provision's command is "unexceptionable"); *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah 1977) (plaintiff in Relief Act case held not required to prove that inability to pay on installment contract for purchase of automobile was due to military service; defendant who repossessed car while plaintiff was on active duty was still liable); *Pacific Finance Corp. v. Gilkerson*, 217 S.W.2d 440 (Tex.App. – Beaumont 1948, no writ) (wrongful repossession of armed service member's automobile in violation of Relief Act entitled service member to recover actual and exemplary damages).

Section 532(3) does not call for weighing of interests or contemplation of the parties' "equitable considerations." The statute simply declares outright that **"*no* sale, foreclosure, or seizure of property for nonpayment . . . shall be valid . . . if made during the period of military service."**

In light of this categorical statutory mandate, the only proper issue for consideration is whether the actions of the Respondent Bank render it responsible in whole or in part for the sale, foreclosure, and/or seizure of Petitioners' farm equipment.

Acknowledging that Captain Engstrom "was undoubtedly a member of the class protected by the Relief Act," 47 F.3d at 1463, the Fifth Circuit further recognized that "[t]he Bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt." *Id.* Nonetheless, the court accepted the Bank's claim of entitlement to summary judgment on the purported grounds that the Bank did not itself directly seize the equipment and place it in the auction, but rather that the Engstroms' neighbor Jim Clipson did so, and that the Bank therefore could have no liability under the Relief Act. *Id.*

The Fifth Circuit's concept of the Act's purview is far too narrow. Even the conceded actions of the Bank with respect to the sale of the Engstroms' farm equipment defy the absolute statutory prohibition. If anything, the *undisputed* evidence revealing the role of the Bank compels the conclusion as a matter of law that the Bank transgressed § 532(3) by arranging for and taking the proceeds from the sale of the Engstroms' property while Captain Engstrom was on military duty overseas. The sale which the Bank organized and from which the Bank directly benefitted was *invalid*, and the Bank was thereby unjustly enriched. That is enough for Petitioners to maintain their cause of action against the Bank under § 532(3) and to hold the Bank accountable for the loss caused by the unlawful sale of Petitioners' property.

II. The Lower Courts Misapplied The Standard Of Review Of The Evidence Relating To A Motion For Summary Judgment

At the very least, the conclusion that the Bank bears responsibility for the invalid sale of the Engstroms' equipment is one that can reasonably be inferred from the evidence of record. Particularly probative are the notations in the Bank's loan files about Captain Engstrom's military status and about the Bank's plans to require payment on the loans by the end of 1990 or else have the Engstroms' farm equipment **"liquidate[d]"** or placed in **"the bank's equipment auction."** Taken together with the Engstroms' testimony about their dealings with the Bank, and the admissions in the deposition testimony of the Bank's own executive officials, Travis Wegenhoft and Sam Thomson, about their role in the auction of the Engstroms' equipment and the disposition of the proceeds, sufficient evidence plainly exists to support Petitioners' claims that the Bank violated § 532(3).

The lower courts, however, held otherwise, viewing the evidence as conclusively exonerating the Bank of responsibility. Both the district court's memorandum and the opinion of the court of appeals give lip service to the proper standard of review of the evidence pertaining to a motion for summary judgment under *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, and their many progeny. See, e.g., *Engstrom*, 47 F.3d at 1462. But the lower courts' ostensible application of the *Celotex/Anderson* standard to the evidence of record in this case reflects more a zeal for granting summary judgments than a fair and proper consideration of the evidence.[11]

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[11] The Fifth Circuit's increasing affinity for summary judgments, and its concomitant willingness to downplay or disregard the non-movants' evidence, is reflected in its recent *en banc* decision in *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) The *en banc* majority in *Little* justified its approach to summary judgments in part by bemoaning "back-

The standards of review of a summary judgment motion established in *Celotex* and *Anderson* were not intended to grant *carte blanche* to the lower courts to weigh conflicting evidence, to decide what evidence to accept or reject, or to elect whose testimony to believe. In order to temper and restrain the lower courts' increasing penchant for easing their own burdens by too casually granting summary judgments in reliance on the *Celotex/Anderson* line of cases, they must be required to abide by this Court's cautionary admonitions in *Anderson*:

> **[I]n ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden.** This conclusion is mandated by the nature of this determination. The question here is whether a jury could find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. * * *
>
> **Our holding that the . . . standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,** whether he is ruling on a motion for summary judgment or a directed verdict. **The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor**.

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logs in the district courts and the high cost of litigation." *Id.* at 1076. Those factors should have nothing to do with the evaluation of evidence to determine the existence of genuine, material fact disputes in a given case; their very invocation suggests that clearing the courts' dockets is of greater importance than citizens' right to have their day in court on legitimate civil claims.

Id. at 259-60. (italics are the court's; boldface emphasis added)

In the present case, the district court and court of appeals have engaged in the very sort of judicial usurpation of the jury's role decried in the above passage from *Anderson*. The lower courts' summary denial of Petitioners' right to trial by jury is especially unwarranted in light of *Conroy's* recent explication of the "substantive evidentiary burden" for a claim by an aggrieved member of the armed services under the Soldiers' and Sailors' Civil Relief Act.

A. The District Court Disregarded Evidence About The Bank's Role In The Sale Of The Engstroms' Property

The district court concluded as a matter of law that the Bank did not violate the Relief Act because of Jim Clipson's involvement in Captain Engstrom's arrangement with the Bank for making loan payments while he was away on military duty.

This simplistic conclusion does not reflect a thorough review of the evidence of record; in fact, the court's memorandum opinion makes *no* mention of the affidavits, bank records, and other controverting evidence filed by the Engstroms, which demonstrate the Bank's direct involvement in the planning and execution of the foreclosure and liquidation of the Engstroms' property, the proceeds from which went directly into the Bank's coffers.

The district court's decision certainly does not reflect a proper consideration of the evidence and reasonable inferences from the perspective of the non-movant Petitioners; to the contrary, the court's memorandum opinion relies exclusively on short, self-serving excerpts of deposition testimony by the Bank's own officers (which were attached to the Bank's motion for summary judgment), and disregards an abundance of controverting evidence showing the Bank's active role in the unlawful sale of the Engstroms' property.

The district court's initial discussion of the background facts, although sparse, is generally correct:

> John Engstrom was called to active duty in October 1990, and was deployed to the Persian Gulf on October 23, 1990. Pls' Original Petition at p. 2. Prior to his departure, Engstrom made arrangements with the Bank for a neighbor, James Clipson, to carry out the orderly sale of Engstrom's assets as necessary to meet payments due on outstanding loans. Id. Plaintiffs contend that John Engstrom notified the Bank not to sell his equipment at an auction sale. Despite Engstrom's request[,] on January 26, 1991, an auction was conducted at which the plaintiffs' equipment was allegedly sold for wholly inadequate consideration.

(See Appendix: District Court Memorandum, p. 2)

After this introductory statement, however, the district court departs from the undisputed background facts and purports to resolve contested facts about the events in question:

> Although plaintiffs endeavor to show that the Bank carried out the auction, all plaintiffs have actually demonstrated is that Bank officers aided "people that were interested in selling some equipment." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 114; Dep. of Sam Thomson at p. 114. Sam Thomson, a bank officer, merely assisted in contacting an auctioneer and also arranged for an auction site. He explained that "it's unfair to characterize it as the bank's auction." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 88; Dep. of Sam Thomson at p. 88.[12] * * *

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[12] As shown by the district court's quotations from specific evidentiary attachments, the court's conclusions are based on assuming the credibility and accuracy of isolated snippets of the deposition testimony of Sam Thomson, one of the Respondent Bank's own involved officers.

> The sole violation asserted against the Bank under the Soldiers' and Sailors' Civil Relief Act is that the Bank allegedly seized the plaintiffs' equipment and sold it at auction at an unreasonably low price. The Bank's summary judgment evidence demonstrates that it was Clipson and not the Bank that placed the equipment in auction. Def.'s mot. for Summ. J. at Ex. B at pp. 36-37, 54-55; Dep. of James Clipson at pp. 36-37, 54-55. In an effort to raise a genuine issue of material fact the plaintiffs contend that they never gave Clipson the authority to sell the equipment at an auction sale. Assuming, arguendo, that Clipson was mistaken about his authority to sell the plaintiffs' equipment at an auction[,] the damage sustained could not be imputed to the Bank, but rather to Clipson who is not a party to this proceeding. The Bank did not violate the statute.

(See Appendix; District Court Memorandum, pp. 2, 4-5)

These few conclusory "findings" constitute the sum total of the district court's discussion of the evidence of record. As the opinion states, the court adopts as determinative *"the Bank's summary judgment evidence."* The court casually dismisses, with virtually no discussion, the *Engstroms'* summary judgment evidence, set out above, showing that the Bank was directly and integrally involved in the arrangement with Captain Engstrom and Clipson concerning how the Engstroms' debts were to be paid during his absence; that the Bank, in disregard of the agreed arrangements, directed, approved, and/or acted in concert with Clipson in the foreclosure, seizure, and sale of the Engstroms' farm equipment at *the Bank's auction* on January 26, 1991; and that the Bank received all of the proceeds of the sale.[13]

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[13] This abundance of evidence directly controverting the Bank's alleged lack of responsibility for the sale of the Engstroms' equipment was attached to Petitioners' response and supplemental response to

A. The Court Of Appeals Disregarded Evidence About The Bank's Role In The Sale Of The Engstroms' Property

The Fifth Circuit's discussion of the summary judgment evidence is, if anything, even more deferential to the movant Bank and disdainful of the Petitioners' controverting evidence than is the district court's memorandum.

The court of appeals gives three reasons for upholding the summary judgment: (1) that the Bank "thought that Clipson had Engstrom's permission to sell the equipment," *Engstrom* at 1464; (2) that there was "no summary judgment evidence inferring [sic] that Clipson was an agent of the Bank," *id.*; and (3) that the Bank's "acquiescence" in Clipson's sale of the equipment is insufficient to make the Bank liable under the Relief Act. *Id.* Petitioners will address these three points in order.

1. The Fifth Circuit Improperly Resolved Disputed Facts About The Bank's Knowledge Of And Involvement In The Sale

The court of appeals acknowledges that John Engstrom "testified that he told Clipson and Wegenhoft that his property was not to be sold at auction," *Engstrom* at 1463, and that "[t]he bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt." *Id.*

But the court then recites that "Clipson testified that he thought that he had John Engstrom's permission to sell the equipment at auction," *id.*, and (based on Wegenhoft's testimony about his alleged "understanding" that Engstrom instructed Clipson to deliver the equipment to the sale) that

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Respondent's motion for summary judgment. (R. 6:831-839, 682-781, 4:1653-1660; 2:2396-2505)

the Bank "also thought that Engstrom had given Clipson permission to sell the equipment at auction." *Id.* The court then reaches the remarkable conclusion that as a matter of law the Bank is not responsible under the Relief Act because "[t]he testimony is *uncontradicted* that Clipson sold the equipment with, what [the Bank] and Clipson thought was, Engstrom's permission." *Id.* at 1464. (emphasis added)

This conclusion (1) demonstrates a dexterous disregard for the court's own recounting of Captain Engstrom's explicit testimony directly refuting what Clipson and the Bank claimed about his instructions, and (2) rests improperly on assuming the credibility of the Bank officers' self-serving testimony about what the Bank "thought" with respect to Clipson's authority to auction off the Engstroms' equipment *en masse*. One could hardly contrive a more egregious example of a court's improper assumption of the jury's fact-finding role than the granting of a summary judgment based on (directly controverted!) testimony about what an interested party claims to have "understood" or "thought."

John Engstrom's affidavit and deposition testimony state *unequivocally* that the arrangements and agreements he made for servicing the loan payments were made with *both* Clipson *and* the Bank. (R. 6:780-781, 713-715) Captain Engstrom's affidavit vigorously refutes the contention that he gave either Clipson *or* the Bank permission to sell the equipment at auction; it states that **"I also specifically told Mr. Travis Wegenhoft not to sell the equipment at an auction sale while I was gone."** (R. 6:780-781) Captain Engstrom's affidavit further points out that he did not know of the transfer of the equipment from his barn to the auction site, and that he never even received notice that an auction sale would be held. (R. 6:780-781)

The notations in the Bank's own monthly loan-status reports show that the Bank obviously knew Captain Engstrom was on active military status overseas when the auction was arranged and held. (R. 6:745-6) And the entries stating: "***Have arranged* for Jim Clipson, Jr. to sell all equipment"**;

"*Have* an appraisal of equipment from local dealer and *proceeding* to sell equipment"; and **"Anything not sold will go into *Bank's equipment auction*,"** clearly implicate the Bank in the process of arranging and effectuating the sale. Indeed, the subject-less verb forms "Have" [an appraisal] and "Have arranged" [for the sales] necessarily refer to the Bank as the implied subject (or at least one of the subjects) of the verbs.

The lower courts could not properly conclude from this evidence that the Bank *undisputedly* "thought" the auction sale was effected by Clipson at Captain Engstrom's direction. To come to such a conclusion as a matter of law is to stand the summary judgment standard of review on its head.

The one case relied on by the Fifth Circuit as authority for its conclusion, *Pailet v. Ald, Inc.*, 194 So.2d 420 (La. App. 1967), *see Engstrom*, 47 F.3d at 1463 and 1464, does not provide support for the summary judgment rendered here. In *Pailet*, a serviceman/mortgagor's dry-cleaning equipment was surrendered to the mortgagee in consideration for forgiveness of the mortgage during the period of his military service. He was held not to have a claim against the mortgagee because his mother was found to have acted as his agent in resolving a complaint about the equipment by demanding the mortgagee to remove it in exchange for forgiveness of the debt. Notably, the fact-finder in *Pailet* determined the mother's authority to make the agreement on behalf of the mortgagor only after a trial on the contested agency issue and a resolution of the *conflicting testimony* on that issue. *Id.* at 422. In addition, the record in *Pailet* showed that the service member/mortgagor had made no effort to repudiate the agreement after learning of it, but rather had ratified it by his subsequent conduct. *Id.*

The court in *Pailet* held that there was no violation of § 531 of the Relief Act[14] because the mortgagee had not

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[14] Section 531 is similar to § 532; it provides that "[n]o person who has received . . . under a contract for the purchase or real or personal

initiated the rescission of the contract, but rather had made the agreement only upon the demand of the mortgagor's representative, and because the mortgagor/service member had not been prejudiced by the agreement made on his behalf, in which he had later acquiesced. *Id.* at 423.

Clearly, *Pailet* is inapposite here for at least two reasons: (1) the alleged agent's authority to act for the debtor in agreeing to the surrender of the property was determined by the fact-finder only after a *full trial of the contested facts*; and (2) the court relied in part on a lack of prejudice to the debtor, which is not a valid consideration under § 532(3) in the wake of this Court's observation in *Conroy* that "Congress included a prejudice requirement [in parts of the Relief Act] whenever it considered appropriate to do so, and that its omission of any such requirement in [other parts of the statute] was deliberate." *Conroy*, 113 S.Ct. at 1565.[15]

If whether the Bank "thought" Clipson was given permission to auction off the Engstroms' equipment is even a material fact affecting the Bank's liability for its involvement in the invalid sale, then a remand for trial is necessary in this

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property . . . a deposit or installment of the purchase price . . . from a person . . . who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof . . . except by action in a court of competent jurisdiction."

[15] Interestingly, as an example of a provision of the Relief Act in which the statutory protection is conditioned on a showing of prejudice, the Court in *Conroy* cited § 532(2), which authorizes a court to stay efforts to enforce a mortgage obligation "unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service." *Conroy*, 113 S.Ct. at 1565. Section 532(2) is not involved here, since the Bank did not commence a proceeding in court to enforce the Engstroms' obligations, but rather acted extra-judicially to satisfy a portion of their debts via the auction sale of their farm equipment.

case to permit a jury to resolve the direct conflict in the evidence about the Bank's state of knowledge of Clipson's authority in that regard.

2. The Fifth Circuit Improperly Resolved Disputed Facts About Whether Clipson Was Acting As An Agent Of The Bank

The evidence of record also establishes – or at the very least raises a reasonable inference – that Jim Clipson cooperated, coordinated, and worked in concert with the Bank, and/or as the Bank's agent, in foreclosing on, taking possession of, and selling the Engstroms' equipment at the auction.

As set out in the factual summary earlier, both Clipson – who was himself indebted to the Bank – and the Bank's executive vice-president, Travis Wegenhoft, admitted that Clipson continually consulted with Wegenhoft and that *Wegenhoft approved all of Clipson's sales of the Engstroms' equipment*. The notations referred to above in the Bank's loan files further indicate that the Bank actively managed the arrangements with Clipson to handle the sales. The Bank's senior vice-president, Sam Thomson, admitted that he, not Clipson, was the person who made all the arrangements for the January 1991 auction sale, including selecting the auctioneer. The auction – which involved sales of various farm debtors' property – was obviously for the Bank's benefit, not for Clipson's; it was, in the Bank's own repeated words from its loan file, **"the Bank's equipment auction."**

Other evidence of record supports the inference that Clipson was acting for the Bank rather than the Engstroms. While Clipson was attempting to sell the individual pieces of equipment (before the auction), a man named L. D. Schilling offered to buy the Engstroms' pickup for $3500. Lyndia Engstrom forwarded the offer to her husband, who told her to have Clipson refuse it. Despite her instructions to Clipson to turn down the offer, however, Wegenhoft called her and informed her that since the Bank had the title to the pickup, it

was going to go ahead and have it sold to Schilling for $3500. (R. 6:705-706, 750-751)

The totality of the evidence plainly gives rise to the reasonable inference that Clipson was acting as an agent for, and/or in concert with, the Bank in selling the equipment at the auction.

3. The Bank's Role Was Sufficient To Render It Liable For Causing An Invalid Sale Under § 532(4) Of The Relief Act

The Fifth Circuit has chosen to describe the Bank's role in the sale of the Engstroms' farm equipment as mere "acquiescence" to Clipson's conduct. That is not a fair characterization, nor does it in any event exonerate the Bank from liability for violation of the Relief Act's explicit prohibition.

The Bank certainly treated the sale of the Engstroms' property as its own. Wegenhoft not only approved Clipson's initial itemized sales, he actually signed the bills of sale on several of the items sold. Then the Bank's officers arranged for and attended the auction, and Wegenhoft even signed John Engstrom's name to the check turning over the proceeds of the auction sale to the Bank. (R. 6:719)

Finally, Wegenhoft had the audacity to write Mrs. Engstrom a personal note shortly after the auction, saying how badly he felt about having sold off her family's property but reminding her to be "proud of what John is doing" by his service to the country! (R. 6:749)

The Bank's actions, by any fair assessment, went well beyond mere "acquiescence" in a sale by Clipson. But even if all of this evidence were not sufficient to show that the Bank itself, by its direct role in the auctioning of the Engstroms' farm equipment, was sufficiently engaged in the "sale, foreclosure, or seizure of property for nonpayment of any sum" to violate § 532(3) alone, the evidence still demonstrates a fact issue on the Bank's liability for knowingly **"mak[ing] *or* caus[ing] to be made any sale, foreclosure, or seizure of**

property, defined as invalid by subsection (3) hereof . . . ." 50 U.S.C. Appx. § 532(4).

The Fifth Circuit dismisses this statutory language by asserting in a footnote that § 532(4) "is a criminal statue and [therefore] is not apropos to this discussion." *Engstrom*, at 1464, n. 1. To the contrary, § 532(4) clarifies who may be held answerable for an invalid sale conducted in violation of the strict prohibition of § 532(3). If one who *causes* an unlawful sale to be made may be responsible even to the extent of criminal sanctions, then surely such a party may also be civilly liable for the loss brought about by the violation of the Soldiers' and Sailors' *Civil* Relief Act.

Certainly there is sufficient evidence of the Bank's involvement to present a genuine issue of fact for the jury as to whether the Bank "made *or caused to be made*" a sale, foreclosure, or seizure of the Plaintiffs' farm equipment by means of arranging for "the bank's equipment auction."

Properly viewing the evidence and the reasonable inferences therefrom in the light most favorable to the non-movant Petitioners, and under the liberal – i.e., the literal – construction of § 532 of the Soldiers' and Sailors' Civil Relief Act in favor of service members as mandated by this Court's decision in *Conroy*, the summary judgment against Petitioner John Engstrom should be reversed.

III. Section 536 Of The Relief Act Protects Captain Engstrom's Family Members

Because of the lower courts' summary disposition of the case on the basis of the Bank's alleged non-liability for violation of § 532 of the Relief Act, the courts did not reach the other Petitioners' claims for relief under § 536 of the Act.

The Bank contends that only Captain Engstrom has standing to assert a claim under the Relief Act because only he was a party to the consolidated note and security agreement on the farm equipment. But one of the notes executed by JTE Joint Venture, in which Cynthia and Melissa Engstrom were joint venturers and thus necessarily joint obligors, was

also secured by the same equipment, and both the Engstroms and the Bank intended that the proceeds from any itemized equipment sales be used to pay off all of the Engstroms' notes, including those of JTE Joint Venture and Coltair, Inc. The net proceeds of the auction sale of the Engstroms' equipment ($60,115.35) were in fact applied to both John Engstrom's consolidated note ($54,334.42) *and* to a note executed by JTE Joint Venture ($5,780.93). (R. 749)

Section 536 expressly extends the same protections afforded by the Act to the dependents of a person in the armed services as to the person himself. See, e.g., *Reid v. Margolis*, 181 Misc. 222, 44 N.Y.S.2d 518 (1943) (Relief Act's protections extend to prohibit foreclosure on home of parents of service member who were dependent on son's income); *Tucson Telco Federal Credit Union v. Bowser*, 9 Ariz.App. 242, 451 P.2d 322 (1969).

To refuse to extend the statutory protection to the Engstrom family members and their family business entities would be to ignore the reality that the Engstroms' rice farm was the primary source of employment and income for all members of the family at that time, and that the entire family enterprise was adversely affected by Captain Engstrom's activation for military service.

Further, Lyndia Engstrom was presumptively a community property owner of the equipment purchased by John Engstrom during their marriage. It is the Bank's burden to prove that she had no interest in the equipment or that it was her husband's separate property. TEX.FAM.CODE § 5.02; *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975)

By virtue of § 536, all of the Petitioners, i.e. all of the Engstrom family and their closely-held family business entities, are entitled to a reversal of the summary judgment rendered against them.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners John T. Engstrom and Lyndia Engstrom, Individually and as Next Friends of Andrea Engstrom; John T. Engstrom, Melissa Engstrom, and Cynthia Engstrom, Individually and d/b/a JTE Farms Joint Venture; and Coltair Farms, Inc., pray that the Supreme Court grant their Petition for Writ of Certiorari, and that upon final hearing, the Supreme Court reverse the judgments of the courts below and remand this cause for trial; and that the Court grant Petitioners such other and further relief, at law or in equity, to which they may show themselves justly entitled.

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John T. ENGSTROM, and Lyndia Engstrom, Individually and as next friends for Andrea Engstrom, John T. Engstrom, Melissa Engstrom and Cynthia Engstrom, Etc., et al., Plaintiffs-Appellants, Cross-Appellees,

v.

The FIRST NATIONAL BANK OF EAGLE LAKE, Defendant-Appellee, Cross-Appellant.

No. 93-2719.

United States Court of Appeals,
Fifth Circuit.

March 29, 1995.

Serviceman sued bank under Soldiers' and Sailors' Civil Relief Act after his farm equipment, in which bank had security interest, was sold at auction while he was on active military duty. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed serviceman's claims but allowed complaint to be amended to allege state law claims and remanded state law claims to state court. On cross-appeals, the Court of Appeals, Stewart, Circuit Judge, held that: (1) bank's acquiescence in auction sale of serviceman's farm equipment and its organization of auction did not make it liable under Relief Act because bank thought that neighbor who sold equipment at auction had serviceman's permission and there was no evidence that neighbor was agent of bank; (2) allowing serviceman to amend complaint to add claims under Texas Deceptive Trade Practices Act was not abuse of discretion; and (3) remand of state law claims to state court was not abuse of discretion.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before JONES and STEWART, Circuit Judges, and DUPLANTIER*, District Judge.

STEWART, Circuit Judge:

John T. Engstrom and his family appeal the judgment of the district court dismissing their claims under the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.App. §§ 501-593 against the First National Bank of Eagle Lake ("First National"). First National has filed a cross-appeal of the district court's judgments to allow the original complaint to be amended and to remand the state law claims to state court. For the following reasons, the judgments of the district court are affirmed.

BACKGROUND

John T. Engstrom operated a rice farm in Texas. His farm was financed by the First National Bank of Eagle County. Engstrom owed approximately $412,600 to First National. Part of this debt was secured by the equipment used on the farm. In October 1989, John Engstrom was called to active military duty and was deployed to the Middle East. Prior to his departure, Engstrom made arrangements with First National for a neighbor, James Clipson, to carry out the orderly sale of Engstrom's equipment, as necessary, to meet payments due on the outstanding loans. Engstrom met with Travis Wegenhoft,

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*District Judge of the Eastern District of Louisiana, sitting by designation.

First National's vice president, and obtained First National's consent to sell the equipment at private sales and to supply the sales proceeds to the loan balances. Some pieces of equipment were sold as a result of private sales, but on January 26, 1991, most of the equipment was sold at auction.

The equipment was moved to the auction site by Clipson. Sam Thompson, a senior vice president with First National, contacted the auctioneer and arranged a location for the auction. Equipment belonging to Engstrom and other farmers in the area was auctioned. Both Mr. Thompson and Wegenhoft were present at the auction. Following the auction, Mr. Wegenhoft signed Mr. Engstrom's name to the checks for Engstrom's portion of the proceeds, and had the proceeds applied to Engstrom's outstanding debt.

Tom Engstrom and Lyndia Engstrom, individually and on behalf of their children Andrea Engstrom, John T. Engstrom, Melissa Engstrom and Cynthia Engstrom d/b/a JTE Farms Joint Venture, and Coltair Farms, Inc. (collectively "Engstrom") filed suit in state court alleging that First National had violated the strictures of the Soldiers' and Sailors' Civil Relief Act ("Relief Act") which forbid the sale of the property during a military personnel's service period without a court order. He also filed pendent state claims. First National removed the suit to federal court.

First National filed a motion for summary judgment contending that it had not violated the Relief Act. Engstrom also filed a motion to amend his complaint. The district court granted both motions and then remanded

the state law claims to state court. Engstrom appeals the judgment of the district court dismissing his federal claims; First National has filed a cross-appeal contending that the district court erred in allowing Engstrom to amend his complaint.

STANDARD OF REVIEW

This Court's reviews a district court's grant of summary judgment *de novo. Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Summary judgment under Fed.R.Civ.P. 56(c) is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial. *Id.* at 322-24, 106 S.Ct. at 2552-53; Fed.R.Civ.P. 56(e).

A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.,* 812 F.2d 219, 222 (5th Cir.1987). There must be evidence giving rise to reasonable inferences that support the non-moving party's position. *St. Amant v. Benoit,* 806 F.2d 1294, 1297 (5th Cir.1987).

DISCUSSION

Engstrom contends that the district court erred in dismissing his claims under the Soldiers' and Sailors' Civil Relief Act 50 U.S.C.App. §§ 501-593. ("Relief Act"). The purpose of the Relief Act is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation. 50 U.S.C.App. § 510. The Relief Act applies to servicemen and reservists who are ordered to report for military service. *See* 50 U.S.C.App. §§ 511 & 516. The provision of the Relief Act are to be liberally construed. *Koons v. Nelson*, 11[illegible] Colo. 574, 160 P.2d 367, 372 (1945). Although the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims. *Slove v. Strohm*, 94 Ill.App.2d 129, 236 N.E.2d 326, 328 (1968). The Relief Act is to be administered as an instrument to accomplish substantial justice which requires an equitable consideration of the rights of parties to the end that their respective interests may be properly conserved. *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576, 582 (1943)

Amongst the Relief Act's many provisions is a prohibition against the sale or foreclosure of a serviceman's mortgaged property in 50 U.S.C.App. § 532. The pertinent provisions of 50 U.S.C.App. § 532 are as follows:

> (3) *No sale, foreclosure, or seizure of property for nonpayment of any sum due* under any such obligation, or for any other breach of the terms thereof . . . shall be valid if made during the period of military service or within three months thereafter. . . . [emphasis ours].

This provision applies to obligations incurred before or during military service. 50 U.S.C.App. § 532(2). A serviceman can give a written release to allow for the sale or foreclosure of his property. *See* 50 U.S.C.App. §§ 517 & 532(3). The Relief Act also allows agents authorized under state law to dispose of the serviceman's property. *See Pailet v. Ald, Inc.*, 194 So.2d 420 (La.Ct.App.1967).

Engstrom argues that First National sold his farm equipment in violation of the Relief Act. As a reservist called to active duty, Engstrom was undoubtedly a member of the class protected by the Relief Act. His obligation was incurred before he was called up to active service and thus he meets the qualifying provision of 50 U.S.C.App. § 532(2). The only question remaining is whether the bank violated the act by selling the equipment.

The summary judgment evidence submitted by the Bank and Engstrom is as follows: In the Fall of 1990, before John Engstrom was called up to military service, the bank had written in its loan reports that Engstrom's loans had to be moved or be liquidated. In his deposition, John Engstrom testified that before he left he arranged with Clipson and Wegenhoft to sell some of his equipment at private sale to pay some of the debt. He also testified that he told Clipson and Wegenhoft that his property was not to be sold at auction.

Clipson testified, in deposition, that he was the person who gathered Engstrom's equipment together and sold it at the auction. He also testified that John Engstrom had given him permission to sell the equipment when Engstrom had temporarily returned from the service one

weekend. Clipson also stated that he obtained the permission of the bank to sell the property. In his deposition, Wegenhoft testified that he had not directed the equipment to be sold. He stated that it was his understanding that Engstrom had given his permission to Clipson to sell the equipment at auction.

In the bank's loan reports is this November 30, 1992 statement about the status of the loan:

> ACTION PLAN: Have arranged for Jim Clipson, Jr. to sell all equipment. Rent house is for sale. Will suggest lowering price close to values used here.
>
> STATUS: Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction in late January.

The bank arranged the auction, signed off on some of the bills of sale, and signed John Engstrom's name to the checks in order to apply the auction proceeds to the debt.

The summary judgment evidence submitted to the district court demonstrates that it was Clipson, not First National, that placed Engstrom's equipment in auction. Clipson gathered the equipment together, took it to the auction, and sold it. Clipson testified that he thought that he had Engstrom's permission to sell the equipment at auction:

> Q Was it Travis [Wegenhoft] that asked you to go ahead and bring the equipment [to auction].
>
> A No, John [Engstrom] asked me to do it.

First National also thought that Engstrom had given Clipson permission to sell the equipment at auction:

> Q So, the bank didn't sell it at the auction sale.
>
> A No.
>
> Q Who did?
>
> A John Engstrom instructed Jim Clipson to deliver it to the sale. Well, that's my understanding; but from here it sounded like John Engstrom's folks were to deliver it.

The testimony is uncontradicted that Clipson sold the equipment with, what First National and Clipson thought was, Engstrom's permission.

Although Engstrom produced evidence that First National acquiesced in the sale of the equipment and that it organized the auction, First National is not liable under the Relief Act for selling the equipment for several reasons. First, as we have stated above, First National thought that Clipson had Engstrom's permission to sell the equipment. *See Pailet,* 194 So.2d at 423 (holding that duly authorized representatives may sell a serviceman's property). Second, Engstrom submitted no summary judgment evidence inferring that Clipson was an agent of the bank, which could impute Clipson's action to the bank, when the equipment was sold. Third, we have found no authority indicating that First National's acquiescence to Clipson's sale of the equipment or that First National's organization of the auction where the equipment was sold makes it liable under the Relief Act.[1]

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[1] Engstrom argues that First National is liable under 50 U.S.C.App. § 532(4) of the Relief Act for "mak[ing or caus[ing]"

In his brief, Engstrom strenuously argues that Clipson did not have permission to sell his equipment. He points to his own deposition and affidavits in which he unequivocally denies giving Clipson permission to sell the equipment. However, for summary judgment purposes, assuming arguendo that Clipson did not have the authority to sell the equipment at auction, such lack of authority would only give Engstrom a potential action against Clipson who is not a party to the lawsuit. As noted by the District Court, Engstrom's proof fails to establish liability of First National under the Relief Act.

CROSS-APPEAL

First National contends that the district court erred in allowing Engstrom to amend his complaint. The amendments added claims under the Texas Deceptive Trade Practices Act, the Texas Uniform Commercial Code, and a claim for negligence. First National argues that because the additional causes of action were dependent on the allegations that the bank sold Engstrom's equipment, it was futile for the district court to allow the amendments.

The Federal Rules of Civil Procedure provide that, after an answer has been filed, "a party may amend the party's pleading only by leave of court" and that "leave to amend shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In the absence of . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave

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a sale to be made. This section of the Relief Act is a criminal statute and is not apropos to this discussion.

sought should, as the rules require, be "freely given." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). This Court review a district court's denial of leave to amend a complaint for abuse of discretion. *Avatar Exploration Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 320 (5th Cir.1991).

In the amendments, Engstrom states that First National could be liable under the Texas Deceptive Trade Practices Act. This Act defines an unconscionable act as any act which takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree. Tex.Bus. & Com. § 17.45. Engstrom states that even if it was true that First National did not sell his equipment in auction, First National still knew before the sale that (1) the equipment was going to be sold and (2) the sale was contrary to his wishes and instructions.

In brief, Engstrom argues that First National could have committed a unconscionable act in taking advantage of his lack of knowledge, ability, experience, or capacity when it did not prevent the sale even though it had every right and opportunity to do so. The district court considered these claims under the factors enunciated in *Foman* and allowed the amendments. After thoroughly examining the record and the applicable law, we find no abuse of the district court's discretion in granting the motion to amend. We therefore find this contention to be without merit.

First National also contends that the district court erred in remanding the remaining state law claims to

state court.[2] The general rule is that state claims should be dismissed once the basis for federal jurisdiction has been dismissed. *Parker & Parsley Petroleum v. Dresser Industries Inc.*, 972 F.2d 580, 585 (5th Cir.1992). The factors to be addressed in determining whether to retain jurisdiction once the federal claims have been disposed of are judicial economy, convenience, fairness, federalism, and comity. *See, e.g., Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 307 (5th Cir.1991), *cert. denied*, 502 U.S. 1096, 112 S.Ct. 1175, 117 L.Ed.2d 420 (1992); *Parker & Parsley Petroleum v. Dresser Industries Inc.*, 972 F.2d 580, 585 (5th Cir.1992).

Although this case has been pending for three years and the parties were in the midst of trial preparation, the amount of judicial resources that were invested into this case, as noted by the district court, has been remarkably small. Since there has been no substantial commitment of judicial resources and the remaining claims can be routinely resolved, the district court did not abuse its discretion by remanding the remaining state claims to state court. *See Parker & Parsley*, 972 F.2d at 587.

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[2] We note that we have jurisdiction over the district court's decision to remand this case. In a case where the district court has the discretion over whether to remand a case, such as the instant case, we have the power to review the district court's decision on appeal. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir.1994).

CONCLUSION

Because there is clear evidence that First National Bank of Eagle Lake did not seize and sell Engstrom's property, the judgment of the district court dismissing Engstrom's Soldiers' and Sailors' Relief Act claims is AFFIRMED. The judgment of the district court granting Engstrom's motion to amend complaint is AFFIRMED. The judgment of the district court remanding this case to state court is also AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN P. ENGSTROM, ET AL, Plaintiffs,	)	CIVIL ACTION NO. H-91-2392
vs.	)	
FIRST NATIONAL BANK OF EAGLE LAKE Defendant.	)	

ORDER

In accordance with the memorandum of even date it is **ORDERED** that the Defendant's Motion for Summary Judgment (Instrument No. 32) is hereby **GRANTED** as to plaintiffs' claim brought under Soldiers' and Sailors' Civil Relief Act of 1940. It is further

ORDERED that the remainder of this case is hereby **REMANDED** to the 25th Judicial District Court of Colorado County, Texas, Cause No. 17,448.

SIGNED at Houston, Texas, this 31st day of August, 1993.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN P. ENGSTROM, ET AL, Plaintiffs,	)	CIVIL ACTION NO. H-91-2392
vs.	)	
FIRST NATIONAL BANK OF EAGLE LAKE Defendant.	)	

MEMORANDUM

(Entered Sept. 2, 1993)

Plaintiffs' bring this action for violations of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-593 (1981 & Supp. 1992), and the Texas Deceptive Trade Practices – Consumer Protection Act. Tex. Bus. & Com. Code Ann. §§ 17.41-17.63.[1] Plaintiffs allege that while John Engstrom was on active duty in the United States Navy during the Persian Gulf war the defendant repossessed and sold the equipment used in the plaintiffs' farming operations. Pending before the Court is the Motion for Summary Judgment (Instrument No. 32) filed by the defendant First National Bank of Eagle Lake (the "Bank"). Having considered the motion the response, the reply, and the applicable law the Court is of the opinion that the motion should be granted.

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[1] This action was removed from the 25th Judicial District Court of Colorado County, Texas, on the basis of federal question jurisdiction.

John Engstrom was called to active duty in October 1990, and was deployed to the Persian Gulf on October 23, 1990. Pls.' Original Petition at p.2. Prior to his departure, Engstrom made arrangements with the Bank for a neighbor, James Clipson, to c ry out the orderly sale of Engstrom's assets as necessary to meet payments due on outstanding loans. Id. Plaintiffs contend that John Engstrom notified the Bank not to sell his equipment at an auction sale. Despite Engstrom's request on January 26, 1991, an auction was conducted at which the plaintiffs' equipment was allegedly sold for wholly inadequate consideration.

Although plaintiffs endeavor to show that the Bank carried out the auction, all plaintiffs have actually demonstrated is that Bank officers aided "people that where interested in selling some equipment." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 114; Dep. of Sam Thomson at p. 114. Sam Thomson, a Bank officer, merely assisted in contacting an auctioneer and also arranged for an auction site. He explained that "it's unfair to characterize it as the bank's auction." Pls.' Resp. to Reply on Support of Defs.' Mot. for Summ. J. at Ex. A, p. 88; Dep. of Sam Thomson at p. 88.

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of

the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987).

The sole violation asserted against the Bank under the Soldiers' and Sailors' Civil Relief Act is that the Bank allegedly seized the plaintiffs' equipment and sold it at auction at an unreasonably low price. The bank's summary judgment evidence demonstrates that it was Clipson and not the Bank that placed the equipment in auction.[2] Def.'s Mot. for Summ. J. at Ex. B. at pp. 36-37, 54-55; Dep. of James Clipson at pp. 36-37, 54-55. In an effort to raise a genuine issue of material fact the plaintiffs contend that they never gave Clipson the authority to sell the equipment at an auction sale. Assuming, arguendo, that Clipson was mistaken about his authority to sell the plaintiffs' equipment at an auction the damage

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[2] The Bank did not violate the Soldiers' and Sailors' Civil Relief Act by consenting to Engstrom's arrangement with Clipson to sell plaintiffs' equipment. *See generally Pailet v. Ald, Inc.*, 194 So.2d 420, 423 (La.Ct.App. 1967) (debtor's agent's voluntary return of equipment to creditor did not violate the Act).

sustained could not be imputed to the Bank, but rather to Clipson who is not a party to this proceeding. The Bank did not violate the statute.

The Court must now decide whether to retain jurisdiction over plaintiffs' pendent state claims. "When the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has 'a powerful reason to choose not to continue to exercise jurisdiction'." *Parker & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988)).

In *Carnegie-Mellon*, the Supreme Court stated that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. at 350 n. 7. Since there has been no substantial commitment of judicial resources and the remaining claims are routinely resolved, *Parker & Parsley*, 972 F.2d at 587 (citing *Shaffer v. Board of School Directors*, 730 F.2d 910, 912 (3rd Cir. 1984)), remand of plaintiffs' state law claims is proper. *Parker & Parsley*, 972 F.2d at 587.

Accordingly, defendants motion for summary judgment as to plaintiffs' federal claims will be granted an [sic] plaintiffs' pendent state claims will be remanded to the 25th Judicial District Court of Colorado County, Texas.

SIGNED at Houston, Texas, this 31st day of August, 1993.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN T. ENGSTROM, ET AL., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
THE FIRST NATIONAL BANK OF EAGLE LAKE, Defendant.	)	H-91-2392

ORDER

(Entered Jan. 11, 1994)

Pending before the Court is the Defendant's Motion to Stay Remand (Instrument No. 93) in which the Defendant seeks a stay of the Court's Order dated September 2, 1993 (Instrument No. 90). The Court's Order granted summary judgment for the Defendant on the federal question in the case and remanded the remaining issues in the case to the state court from which the case had been removed. The Defendant takes issue with the Court's rationale for remand and seeks to distinguish its case from the precedents offered by the Court.

The issue of retaining jurisdiction over Defendant's state law claims related to the federal question that originally made the case subject to federal question jurisdiction is squarely within the trial court's discretion. 42 U.S.C. § 1441(c) (" . . . the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates."); *Carnegie-Mellon University v. Cohill,*

108 S.Ct. 614, 619-23 (1988) (holding that "pendant jurisdiction is a doctrine of discretion, not of plaintiff's right" and that a district court faced with a case involving single federal-law claim and a number of state-law claims "had to consider throughout the litigation whether to exercise its jurisdiction over the case. When the single federal-law claim was eliminated at an early stage of the litigation, the District Court had a powerful reason to chose [sic] not to exercise jurisdiction."); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3739 (1985 & Supp. 1993).

The Court in *Carnegie-Mellon* concluded

> that a district court has discretion to remand to state court a removed case involving pendant claims upon a proper determination that retaining jurisdiction over the case would be inappropriate. The discretion to remand enables district courts to deal with cases involving pendant claims in the manner that best serves the principles of economy, convenience, fairness and comity which underlie the pendant jurisdiction doctrine.

Carnegie-Mellon, 108 S.Ct. at 623 (citations omitted).

> It has always been true that when a case is in federal court, either originally or by removal, the court has discretion whether to hear or to dismiss any state claims that are pendant to the federal claim that is the basis for jurisdiction. Ordinarily it is to exercise that discretion by dismissing the pendant claims if the federal claim has been dismissed before trial. The Carnegie-Mellon case goes beyond the prior law by recognizing in a removed case a discretion to remand the pendant state claims to state court

> rather than to increase the expense and time involved by dismissing and requiring the plaintiff to start over in state court.

14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3739 (1985 & Supp. 1993) (footnotes omitted). "[O]nce a federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect." *Robertson v. Ball*, 534 F.2d 63, 66 n.5 (5th Cir. 1976); 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3740 (1985 & Supp. 1993).

Finding that the decision to remand was within the Court's discretion, and finding that the Court properly considered the *Carnegie-Mellon* factors when it decided to remand, the Court declines the Defendant's suggestion to revisit the issue. The Court notes that the parties have already sought appellate review of the summary judgment and that denying the stay will allow the appeal to be decided expeditiously. Having considered the arguments of counsel and the applicable law, the Court

ORDERS that Defendant's Motion to Stay Remand is DENIED.

SIGNED at Houston, Texas, this 10th day of January, 1994.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE